

necessary supporting analysis, by the end of the public comment period under §124.10 or §124.118. (40 CFR 52.21(q)(3) provides for denial of a PSD permit to a facility or activity when the Federal Land Manager demonstrates that its emissions would adversely affect a Class I area even though the applicable increments would not be exceeded. 40 CFR 52.21(q)(4) conversely authorizes EPA, with the concurrence of the Federal Land Manager and State responsible, to grant certain variances from the otherwise applicable emission limitations to a facility or activity whose emissions would affect a Class I area.)

(c) Variances authorized by 40 CFR 52.21 (q)(5) through (q)(7) shall be handled as specified in those paragraphs and shall not be subject to this part. Upon receiving appropriate documentation of a variance properly granted under any of these provisions, the Regional Administrator shall enter the variance in the administrative record. Any decisions later made in proceedings under this part concerning that permit shall be consistent with the conditions of that variance.

#### **Subpart D—Specific Procedures Applicable to NPDES Permits**

##### **§ 124.51 Purpose and scope.**

(a) This subpart sets forth additional requirements and procedures for decisionmaking for the NPDES program.

(b) Decisions on NPDES variance requests ordinarily will be made during the permit issuance process. Variances and other changes in permit conditions ordinarily will be decided through the same notice-and-comment and hearing procedures as the basic permit.

(c) As stated in 40 CFR 131.4, an Indian Tribe that meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State for purposes of the Water Quality Standards program is likewise qualified for such treatment for purposes of State certification of water quality standards pursuant to section 401(a)(1) of the Act and subpart D of this part.

[48 FR 14264, Apr. 1, 1983, as amended at 58 FR 67983, Dec. 22, 1993; 59 FR 64343, Dec. 14, 1994]

##### **§ 124.52 Permits required on a case-by-case basis.**

(a) Various sections of part 122, subpart B allow the Director to determine, on a case-by-case basis, that certain concentrated animal feeding operations (§122.23), concentrated aquatic animal production facilities (§122.24), storm water discharges (§122.26), and certain other facilities covered by general permits (§122.28) that do not generally require an individual permit may be required to obtain an individual permit because of their contributions to water pollution.

(b) Whenever the Regional Administrator decides that an individual permit is required under this section, except as provided in paragraph (c) of this section, the Regional Administrator shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the notice. The discharger must apply for a permit under §122.21 within 60 days of notice, unless permission for a later date is granted by the Regional Administrator. The question whether the designation was proper will remain open for consideration during the public comment period under §124.11 and in any subsequent hearing.

(c) Prior to a case-by-case determination that an individual permit is required for a storm water discharge under this section (see §122.26(a)(1)(v), (c)(1)(v), and (a)(9)(iii) of this chapter), the Regional Administrator may require the discharger to submit a permit application or other information regarding the discharge under section 308 of the CWA. In requiring such information, the Regional Administrator shall notify the discharger in writing and shall send an application form with the notice. The discharger must apply for a permit within 180 days of notice, unless permission for a later date is granted by the Regional Administrator. The question whether the initial designation was proper will remain open for consideration during the public comment period under §124.11 and in any subsequent hearing.

[55 FR 48075, Nov. 16, 1990, as amended at 60 FR 17957, Apr. 7, 1995; 60 FR 19464, Apr. 18, 1995; 60 FR 40235, Aug. 7, 1995; 64 FR 68851, Dec. 8, 1999; 65 FR 30912, May 15, 2000]

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### § 124.53 State certification.

(a) Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate.

(b) Applications received without a State certification shall be forwarded by the Regional Administrator to the certifying State agency with a request that certification be granted or denied.

(c) If State certification has not been received by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency:

(1) A copy of a draft permit;

(2) A statement that EPA cannot issue or deny the permit until the certifying State agency has granted or denied certification under § 124.55, or waived its right to certify; and

(3) A statement that the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency unless the Regional Administrator finds that unusual circumstances require a longer time.

(d) State certification shall be granted or denied within the reasonable time specified under paragraph (c)(3) of this section. The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification shall be in writing and shall include:

(1) Conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law;

(2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and

(3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process.

### § 124.54 Special provisions for State certification and concurrence on applications for section 301(h) variances.

(a) When an application for a permit incorporating a variance request under CWA section 301(h) is submitted to a State, the appropriate State official shall either:

(1) Deny the request for the CWA section 301(h) variance (and so notify the applicant and EPA) and, if the State is an approved NPDES State and the permit is due for reissuance, process the permit application under normal procedures; or

(2) Forward a certification meeting the requirements of § 124.53 to the Regional Administrator.

(b) When EPA issues a tentative decision on the request for a variance under CWA section 301(h), and no certification has been received under paragraph (a) of this section, the Regional Administrator shall forward the tentative decision to the State in accordance with § 124.53(b) specifying a reasonable time for State certification and concurrence. If the State fails to deny or grant certification and concurrence under paragraph (a) of this section within such reasonable time, certification shall be waived and the State shall be deemed to have concurred in the issuance of a CWA section 301(h) variance.

(c) Any certification provided by a State under paragraph (a)(2) of this section shall constitute the State's concurrence (as required by section 301(h)) in the issuance of the permit incorporating a section 301(h) variance subject to any conditions specified therein by the State. CWA section 301(h) certification and concurrence under this section will not be forwarded to the State by EPA for recertification after the permit issuance

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process; States must specify any conditions required by State law, including water quality standards, in the initial certification.

### § 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1) no final permit shall be issued:

(1) If certification is denied, or

(2) Unless the final permit incorporates the requirements specified in the certification under § 124.53(e).

(b) If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under § 124.53 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

(c) A State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition. The Regional Administrator shall disregard any such certification conditions, and shall consider those conditions or denials as waivers of certification.

(d) A condition in a draft permit may be changed during agency review in any manner consistent with a certification meeting the requirements of § 124.53(e). No such changes shall require EPA to submit the permit to the State for recertification.

(e) Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part.

(f) Nothing in this section shall affect EPA's obligation to comply with § 122.47. See CWA section 301(b)(1)(C).

[48 FR 14264, Apr. 1, 1983, as amended at 65 FR 30912, May 15, 2000]

### § 124.56 Fact sheets.

(Applicable to State programs, see § 123.25 (NPDES).) In addition to meeting the requirements of § 124.8, NPDES fact sheets shall contain the following:

(a) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions or standards for sewage sludge use or disposal, including a citation to the applicable effluent limitation guideline, performance standard, or standard for sewage sludge use or disposal as required by § 122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

(b)(1) When the draft permit contains any of the following conditions, an explanation of the reasons that such conditions are applicable:

(i) Limitations to control toxic pollutants under § 122.44(e) of this chapter;

(ii) Limitations on internal waste streams under § 122.45(i) of this chapter;

(iii) Limitations on indicator pollutants under § 125.3(g) of this chapter;

(iv) Limitations set on a case-by-case basis under § 125.3 (c)(2) or (c)(3) of this chapter, or pursuant to Section 405(d)(4) of the CWA;

(v) Limitations to meet the criteria for permit issuance under § 122.4(i) of this chapter, or

(vi) Waivers from monitoring requirements granted under § 122.44(a) of this chapter.

(2) For every permit to be issued to a treatment works owned by a person other than a State or municipality, an explanation of the Director's decision on regulation of users under § 122.44(m).

(c) When appropriate, a sketch or detailed description of the location of the discharge or regulated activity described in the application; and

(d) For EPA-issued NPDES permits, the requirements of any State certification under § 124.53.

(e) For permits that include a sewage sludge land application plan under 40 CFR 501.15(a)(2)(ix), a brief description of how each of the required elements of

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the land application plan are addressed in the permit.

[48 FR 14264, Apr. 1, 1983, as amended at 49 FR 38051, Sept. 26, 1984; 54 FR 18786, May 2, 1989; 65 FR 30912, May 15, 2000]

### § 124.57 Public notice.

(a) *Section 316(a) requests (applicable to State programs, see § 123.25).* In addition to the information required under § 124.10(d)(1), public notice of an NPDES draft permit for a discharge where a CWA section 316(a) request has been filed under § 122.21(l) shall include:

(1) A statement that the thermal component of the discharge is subject to effluent limitations under CWA section 301 or 306 and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under section 301 or 306;

(2) A statement that a section 316(a) request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge under section 316(a) and a brief description, including a quantitative statement, of the alternative effluent limitations, if any, included in the request; and

(3) If the applicant has filed an early screening request under § 125.72 for a section 316(a) variance, a statement that the applicant has submitted such a plan.

(b) [Reserved]

[48 FR 14264, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 65 FR 30912, May 15, 2000]

### § 124.58 [Reserved]

### § 124.59 Conditions requested by the Corps of Engineers and other government agencies.

(*Applicable to State programs, see § 123.25 (NPDES).*)

(a) If during the comment period for an NPDES draft permit, the District Engineer advises the Director in writing that anchorage and navigation of any of the waters of the United States would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advised the Director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the Di-

rector shall include the specified conditions in the permit. Review or appeal of denial of a permit or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers, and may not be made through the procedures provided in this part. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall be considered stayed in the NPDES permit for the duration of that stay.

(b) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other State or Federal agency with jurisdiction over fish, wildlife, or public health advises the Director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the Director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of § 122.49 and of the CWA.

(c) In appropriate cases the Director may consult with one or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the statement of basis, the fact sheet, or the draft permit.

[48 FR 14264, Apr. 1, 1983, as amended at 54 FR 258, Jan. 4, 1989]

### § 124.60 Issuance and effective date and stays of NPDES permits.

In addition to the requirements of §§ 124.15, 124.16, and 124.19, the following provisions apply to NPDES permits:

(a) Notwithstanding the provisions of § 124.16(a)(1), if, for any offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig which has never received a final effective permit to discharge at a "site," but which is not a "new discharger" or a "new source," the Regional Administrator finds that compliance with certain permit conditions may be necessary to avoid irreparable environmental harm during the administrative review, he or she may specify in the statement of basis or fact sheet

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that those conditions, even if contested, shall remain enforceable obligations of the discharger during administrative review.

(b)(1) As provided in § 124.16(a), if an appeal of an initial permit decision is filed under § 124.19, the force and effect of the contested conditions of the final permit shall be stayed until final agency action under § 124.19(f). The Regional Administrator shall notify, in accordance with § 124.16(a)(2)(ii), the discharger and all interested parties of the uncontested conditions of the final permit that are enforceable obligations of the discharger.

(2) When effluent limitations are contested, but the underlying control technology is not, the notice shall identify the installation of the technology in accordance with the permit compliance schedules (if uncontested) as an uncontested, enforceable obligation of the permit.

(3) When a combination of technologies is contested, but a portion of the combination is not contested, that portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.

(4) Uncontested conditions, if inseparable from a contested condition, shall be considered contested.

(5) Uncontested conditions shall become enforceable 30 days after the date of notice under paragraph (b)(1) of this section.

(6) Uncontested conditions shall include:

(i) Preliminary design and engineering studies or other requirements necessary to achieve the final permit conditions which do not entail substantial expenditures;

(ii) Permit conditions which will have to be met regardless of the outcome of the appeal under § 124.19;

(iii) When the discharger proposed a less stringent level of treatment than that contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party; and

(iv) Construction activities, such as segregation of waste streams or installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger's proposed alternative conditions.

(c) In addition to the requirements of § 124.16(c)(2), when an appeal is filed under § 124.19 on an application for a renewal of an existing permit and upon written request from the applicant, the Regional Administrator may delete requirements from the existing permit which unnecessarily duplicate uncontested provisions of the new permit.

[65 FR 30912, May 15, 2000]

### § 124.61 Final environmental impact statement.

No final NPDES permit for a new source shall be issued until at least 30 days after the date of issuance of a final environmental impact statement if one is required under 40 CFR 6.805.

### § 124.62 Decision on variances.

*(Applicable to State programs, see § 123.25 (NPDES).)*

(a) The Director may grant or deny requests for the following variances (subject to EPA objection under § 123.44 for State permits):

(1) Extensions under CWA section 301(i) based on delay in completion of a publicly owned treatment works;

(2) After consultation with the Regional Administrator, extensions under CWA section 301(k) based on the use of innovative technology; or

(3) Variances under CWA section 316(a) for thermal pollution.

(b) The State Director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

(1) A variance based on the economic capability of the applicant under CWA section 301(c); or

(2) A variance based on water quality related effluent limitations under CWA section 302(b)(2).

(c) The Regional Administrator may deny, forward, or submit to the EPA Office Director for Water Enforcement and Permits with a recommendation for approval, a request for a variance

listed in paragraph (b) of this section that is forwarded by the State Director, or that is submitted to the Regional Administrator by the requester where EPA is the permitting authority.

(d) The EPA Office Director for Water Enforcement and Permits may approve or deny any variance request submitted under paragraph (c) of this section. If the Office Director approves the variance, the Director may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under § 124.64.

(e) The State Director may deny or forward to the Administrator (or his delegate) with a written concurrence a completed request for:

(1) A variance based on the presence of “fundamentally different factors” from those on which an effluent limitations guideline was based;

(2) A variance based upon certain water quality factors under CWA section 301(g).

(f) The Administrator (or his delegate) may grant or deny a request for a variance listed in paragraph (e) of this section that is forwarded by the State Director, or that is submitted to EPA by the requester where EPA is the permitting authority. If the Administrator (or his delegate) approves the variance, the State Director or Regional Administrator may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under § 124.64.

[48 FR 14264, Apr. 1, 1983; 50 FR 6941, Feb. 19, 1985, as amended at 51 FR 16030, Apr. 30, 1986; 54 FR 256, 258, Jan. 4, 1989]

**§ 124.63 Procedures for variances when EPA is the permitting authority.**

(a) In States where EPA is the permit issuing authority and a request for a variance is filed as required by § 122.21, the request shall be processed as follows:

(1)(i) If, at the time, that a request for a variance based on the presence of

fundamentally different factors or on section 301(g) of the CWA is submitted, the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit, but has not yet prepared a draft permit under § 124.6 covering the discharge in question, the Administrator (or his delegate) shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

(ii) If, at the time, that a request for a variance under sections 301(c) or 302(b)(2) of the CWA is submitted, the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit, but has not yet prepared a draft permit under § 124.6 covering the discharge in question, the Regional Administrator, after obtaining any necessary concurrence of the EPA Deputy Assistant Administrator for Water Enforcement under § 124.62, shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

(2) If, at the time that a request for a variance is filed the Regional Administrator has given notice under § 124.10 of a draft permit covering the discharge in question, but that permit has not yet become final, administrative proceedings concerning that permit may be stayed and the Regional Administrator shall prepare a new draft permit including a tentative decision on the request, and the fact sheet required by § 124.8. However, if this will significantly delay the processing of the existing draft permit or the Regional Administrator, for other reasons, considers combining the variance request and the existing draft permit

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inadvisable, the request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the administrative disposition of the existing draft permit shall proceed without delay.

(3) If the permit has become final and no application under §124.3 concerning it is pending or if the variance request has been separated from a draft permit as described in paragraphs (a) (1) and (2) of this section, the Regional Administrator may prepare a new draft permit and give notice of it under §124.10. This draft permit shall be accompanied by the fact sheet required by §124.8 except that the only matters considered shall relate to the requested variance.

[48 FR 14264, Apr. 1, 1983, as amended at 51 FR 16030, Apr. 30, 1986]

### § 124.64 Appeals of variances.

(a) When a State issues a permit on which EPA has made a variance decision, separate appeals of the State permit and of the EPA variance decision are possible. If the owner or operator is challenging the same issues in both proceedings, the Regional Administrator will decide, in consultation with State officials, which case will be heard first.

(b) Variance decisions made by EPA may be appealed under the provisions of §124.19.

(c) *Stays for section 301(g) variances.* If an appeal is filed under §124.19 of a variance requested under CWA section 301(g), any otherwise applicable standards and limitations under CWA section 301 shall not be stayed unless:

(1) In the judgment of the Regional Administrator, the stay or the variance sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity, or synergistic propensities; and

(2) In the judgment of the Regional Administrator, there is a substantial likelihood that the discharger will succeed on the merits of its appeal; and

(3) The discharger files a bond or other appropriate security which is required by the Regional Administrator

to assure timely compliance with the requirements from which a variance is sought in the event that the appeal is unsuccessful.

(d) Stays for variances other than section 301(g) variances are governed by §§124.16 and 124.60.

[48 FR 14264, Apr. 1, 1983, as amended at 65 FR 30912, May 15, 2000]

### § 124.65 [Reserved]

### § 124.66 Special procedures for decisions on thermal variances under section 316(a).

(a) The only issues connected with issuance of a particular permit on which EPA will make a final Agency decision before the final permit is issued under §§124.15 and 124.60 are whether alternative effluent limitations would be justified under CWA section 316(a) and whether cooling water intake structures will use the best available technology under section 316(b). Permit applicants who wish an early decision on these issues should request it and furnish supporting reasons at the time their permit applications are filed under §122.21. The Regional Administrator will then decide whether or not to make an early decision. If it is granted, both the early decision on CWA section 316 (a) or (b) issues and the grant of the balance of the permit shall be considered permit issuance under these regulations, and shall be subject to the same requirements of public notice and comment and the same opportunity for an appeal under §124.19.

(b) If the Regional Administrator, on review of the administrative record, determines that the information necessary to decide whether or not the CWA section 316(a) issue is not likely to be available in time for a decision on permit issuance, the Regional Administrator may issue a permit under §124.15 for a term up to 5 years. This permit shall require achievement of the effluent limitations initially proposed for the thermal component of the discharge no later than the date otherwise required by law. However, the permit shall also afford the permittee an opportunity to file a demonstration under CWA section 316(a) after conducting such studies as are required

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under 40 CFR part 125, subpart H. A new discharger may not exceed the thermal effluent limitation which is initially proposed unless and until its CWA section 316(a) variance request is finally approved.

(c) Any proceeding held under paragraph (a) of this section shall be publicly noticed as required by §124.10 and shall be conducted at a time allowing the permittee to take necessary measures to meet the final compliance date in the event its request for modification of thermal limits is denied.

(d) Whenever the Regional Administrator defers the decision under CWA section 316(a), any decision under section 316(b) may be deferred.

[48 FR 14264, Apr. 1, 1983, as amended at 65 FR 30912, May 15, 2000]

**PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

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